REPRESENTATION IN THE NATIONAL CONGRESS FROM THE SECEDING STATES, 1861–65

II.

In the Thirty-eighth Congress (1863–65) senators and representatives were admitted from the new state of West Virginia; but none were admitted to either house from any state which was a member of the Confederacy. The committees favored admission in some cases, but the houses respectively refused to act, for reasons which may now be set forth.

Under the new apportionment act, Louisiana was entitled to five representatives instead of four. A bill had passed the lower house of the Thirty-seventh Congress redistricting the state and authorizing the "acting governors" to hold congressional elections at the times and places stated in the bill until the state legislature should meet and make other provisions.[1] But it failed in the Senate. As there was no legislature, no law could be passed redistricting the state. During the spring, summer and fall of 1863, Military Governor Shepley and his attorney-general, Mr. T. J. Durant, were working, though with great dilatoriness, on a scheme to call a convention to revise the Constitution and organize a state government, taking the ground that the reorganization of the state government must precede the election of congressmen. The opposition elements desired to hold an election; but Governor Shepley would not call it, nor would General Banks interfere. In the opposition, however, were two very different factions: the pro-slavery party, which looked upon the Constitution of 1852, including the slavery clauses, as active in New Orleans and the other parts of the state excepted in the Emancipation Proclamation; and an abolition, universal-suffrage party.

Though the latter party evidently included relatively few white men, it issued a call for an election. But Military Governor Shepley prohibited it. The prohibition was effectual save in a few suburban precincts. In these places polls were opened and an election was held on November 2, 1863, participated in by the negroes, for governor and other state officers to take office Jauuary 1, 1864, and for three representatives in the Thirty-eighth Congress. The governor thus "elected" qualified at once before a magistrate and furnished Messrs. Field, Cottman and Baker with certificates which

[1] *Cong. Globe*, 37 Cong., 3 sess., pp. 1483 et seq. (March 2, 1863).

they presented to Congress, claiming to represent respectively the first and second districts of the old apportionment, and the state at large.

Of course the election was neither full, fair nor free. On the motion to table the motion to refer to the committee, the vote was 74 to 101 (74 Democrats to 97 Republicans and 4 Democrats). The motion to refer then passed, 101 to 71, 98 Republicans voting in the affirmative and none in the negative. The committee unanimously reported adversely, and the house after debate sustained the report by a vote of 85 to 48 on a division. The committee in their report made much of the absence of any law redistricting the state under the new apportionment, and severely criticised the action of the federal appointees.

"It did not appear before the Committee whether the military governor acted in this matter in obedience to the orders of his superior or not; but sufficient was disclosed to show that the loyal men of that state are much divided, and their strength wasted in pursuing and combating abstract theories, and in nursing factions, constantly aiming for the ascendency. And there was too much evidence that the government officials have been lending the influence of their official position to the advancement of these schemes. It is time there was an end to such proceedings." [1]

This means, apparently, that though the election was clearly void, and was so reported, the members of the committee had learned of the officious, if not unconstitutional, behavior of certain federal appointees, which should be brought to the attention of Congress for such action as it might see fit to take. But the expression of the committee may not have been altogether impersonal and dispassionate. The report was made in January, 1864. That date is late enough to justify us in suggesting sympathy with universal suffragists as a motive operative with some members.[2] Moreover, the opposition to President Lincoln was considerable even within his own party; and such partisan interference by the President's appointees, appointed under questioned authority, would be enough to provoke a passing criticism.

In the cases thus far treated, representatives in Congress from individual districts were admitted (or rejected) regardless of the condition of the rest of the state. The remaining cases, both in the House and in the Senate, involve the question of the recognition of the state governments. The issue was precisely stated on the floor of both houses. It was real and important, not factitious or obstruc-

[1] The reader who desires exact references may obtain them by consulting the note at the end of the article.

[2] The House bill referred to in the note on page 461 declared "all free citizens," otherwise qualified, to be legal voters; and not simply "all free white citizens."

tive, for the Supreme Court had said in Luther *vs.* Borden :[1] "When the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they were appointed, as well as its republican character, is recognized by the proper constitutional authority; and its decision is binding on every department of the government." It is notorious what questions of statesmanship and party expediency became involved, and how much passion was shown in the matter as time went on. We have here to study the broaching of the question, the precipitation of the struggle.

In no state was the response to President Lincoln's amnesty proclamation more prompt, full and spontaneous than in Arkansas. The state had not joined the Confederacy until after the call to arms in April, 1861. Missouri, on its northern boundary, was saved to the Union and the Mississippi River was opened to Vicksburg in the first half of 1862. After the fall of Vicksburg in July, 1863, a Union army occupied nearly the whole state. Though by no means free from Confederate guerillas and Confederate sympathizers, it was isolated from the heart of the Confederacy; its troops were drawn off to fight in the East, and its secession state government was banished to a remote corner of the state. There was not and could not be any local and state government except such as could be organized by those willing to act in the presence of the Union army and under its protection. As a matter of fact, the movement for the reorganization antedated the amnesty proclamation of December 8, 1863, by more than two months. But not until January, 1864, was a new constitution abolishing slavery adopted, and a state government organized. Two senators and three congressmen-elect applied for admission to Congress immediately thereafter.

On February 16th the House had under consideration the credentials of J. M. Johnson, from the third district. Mr. Henry Winter Davis (Md., Rep.), seconded by Mr. Boutwell (Mass., Rep.), and Mr. Stevens (Pa., Rep.), vigorously opposed their reference to the Committee of Elections in the usual way, because the more important question of the recognition of the state government of Arkansas would be made incidental to the subordinate question of the claimant's right to a seat. He finally moved to instruct the committee to investigate and report "whether there is any such existing organized government in the state of Arkansas as entitles the state and its people to be represented in the Congress of the United States." The instructions were rejected, 53 yeas to 104 nays (46 Republicans and 7 Democrats to 39 Republicans and 65 Democrats). The case was then sent to the committee.

[1] 7 Howard, 1.

The attitude of the Democrats is significant. The members of the Committee of Elections, with the exception of Messrs. Smithers (Del., Rep.) and Upson (Mich., Rep.), whose minority report in a later case will be noticed in due time, voted against the instructions. Mr. Dawes urged that the only right and courteous thing to do was to give the claimant an opportunity to be heard. He further said: "I can see very well what grave questions are to trouble us in the discussion of this subject upon this floor. In the examination of the questions which come before the Committee on Elections, they have hitherto not found it necessary to involve those graver and more serious questions; and I trust they may be able to put them off still further." However, on June 28th, he reported from the committee a joint resolution, calling on the President to appoint a commission to visit the states in rebellion which should have taken measures to reëstablish state governments, and to examine and report as early in the next session as possible the condition of affairs therein; and further resolving that: "Until Congress shall be satisfied upon evidence submitted to them that the rebellion has been so far suppressed in any such state that there has been established therein a state government, republican in form, and prohibiting the existence of slavery in the same, and so firmly established as to be able to maintain itself against domestic violence, representation from any such states ought not to be admitted into either branch of Congress." The minority, through Mr. Brown (Wis., Dem.), also submitted resolutions concluding with the resolve that if the claimants from Arkansas should satisfy the House "that in their election they departed in nothing from the Constitution and existing laws of the state, save in supplying requisite officers, and that they received a vote of a majority in their respective districts," they were entitled to seats.

On a motion to lay the whole subject on the table, the House divided, 45 yeas, 63 nays. On a motion to postpone until the first Monday of December, the yeas and nays were called and the motion was lost, 50 to 78 (one Republican and 49 Democrats to 75 Republicans and 3 Democrats). The question came up again on June 29th. After a speech from Mr. Brown in behalf of the minority report, the House laid the whole matter on the table, 80 yeas to 56 nays (41 Republicans and 39 Democrats to 32 Republicans and 14 Democrats).

Just before the report of the House Committee of Elections was made, the Senate had before it the credentials of Messrs. Fishback and Baxter, senators-elect from Arkansas, and a joint resolution recognizing the free state government of Arkansas. A lengthy dis-

cussion ensued in which various conflicting opinions were advanced upon the questions of constitutional interpretation and expediency involved. The President was criticised for presuming to interfere. It was also pointed out that this state and any others admitted in the immediate future would participate in the coming presidential election, and that the whole policy of the reorganization of all the rebellious states was involved, a consideration that contributed rather to appall the Senate than to solve the difficulty. A motion to lay on the table was defeated, 5 yeas to 32 nays (4 Republicans and 1 Democrat to 26 Republicans and 6 Democrats), and so the whole matter was referred.

The committee reported a recommendation that the resolution be not passed and that the claimants be not seated. Senator Trumbull, the chairman, is himself authority for the statement that they "sought to avoid in their report the controversial point" whether Arkansas was a state in the Union or not. Their recommendations were based on the ground that the body by which the claimants were elected was not "in a constitutional sense the legislature of Arkansas." The fact that less than one quarter as many voters took part in the reorganization of the state as usually participated in an election before the war was not fatal in itself. But the state was not free from military control, it was alleged, and there were loyalists who could not participate. The President had not "recalled his proclamation [July 13, 1861] which declared the inhabitants of Arkansas in a state of insurrection against the United States," and there was no evidence that the insurrection had been suppressed. While a portion of the state was actually in control of the enemies of the United States, other portions were only held in subordination to the laws of the Union by military force. "While this state of things continues and the right to exercise armed authority over a large part of the state is claimed and exercised by the military power, it cannot be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every state in the Union." The people of Arkansas must be able to act "by the aid of and not in subordination to the military" before their government can be recognized.

Plainly the military control most complained of was that exercised by the Union army. While the complaint may seem reasonable on its face, it would be incorrect not to see in it also some trace of jealousy of the administration by which the army officers were inspired to promote reorganization.

A motion, made by Mr. Wade (Ohio, Rep.) to postpone and

take up H. R. 244, providing a form of government for the seceded states, was defeated, 5 yeas (all Republicans) to 28 nays (including 7 Democratic votes). The report of the committee was then adopted, 27 yeas to 6 nays (20 Republicans and 7 Democrats to 5 Republicans and one Democrat).

Meanwhile the people of Louisiana were reorganizing, with the assistance of General Banks. A full corps of state officers was chosen and took office in March, 1864. The military governor and his appointees retired before them. A convention was held, which revised the Constitution and abolished slavery; redistricted the state and called a congressional election to fill vacancies. In September the revised Constitution was ratified by popular vote and congressmen and a state legislature were elected. In October the legislature chose United States senators and in November it chose an electoral college which would vote for Lincoln. The electoral vote of the state was not counted, neither were the senators and representatives admitted. We must here limit ourselves to a consideration of the fate of the representatives and senators-elect.

All the cases were presented early in the session and properly referred. The House committee was the first to report, but only on February 11, 1865, after the joint resolution excluding the electoral vote of Louisiana, Arkansas, etc., had been passed by both houses. The majority report recommended that Mr. Bonzano be seated as a representative from the first district of Louisiana. The minority report, signed by Messrs. Smithers (Del., Rep.) and Upson (Mich., Rep.), recommended that he be not seated. On February 17th the committee reported favorably in two companion cases from Louisiana, the cases of Mr. Field, from the second, and Mr. Mann, from the third district; and also in two of the Arkansas cases referred to the committee in the former session, those of Messrs. Jacks, from the first, and Johnson, from the third district. The House took no action whatever on any of the cases. Our interest is directed to the reports of the committee.

The significant part of the majority report begins with a reference to Messrs. Flanders and Hahn, members of the Thirty-seventh Congress from Louisiana, whose admission "had a most salutary effect upon the people of the state," and promoted the desire for the resumption of state functions "throughout all that part of the state within our lines."

"This election depends for its validity," the report continues, "upon the effect which the House is disposed to give to the efforts to reorganize a state government in Louisiana." It is objected "that they neither originated in nor followed any preëxisting law of the

state or nation." But the committee show that there was no law in the state applicable to the extraordinary circumstances, nor any body capable of passing such a law, and that Congress has no constitutional authority to "pass an enabling act for the state." Hence "it follows that the power to restore a lost state government in Louisiana existed nowhere, or in the people, the original source of all political power in this country. The people, in the exercise of that power, cannot be required to conform to any particular mode, for that presupposes a power to prescribe outside of themselves, which it has been seen does not exist. The result must be republican, for the people and the states have surrendered to the United States, to that extent, the power over their form of government, in this that the United States shall guarantee to every state a republican form of government." The committee then considered whether the reorganization was the work of the people, and satisfied themselves "that a majority of not only the loyal people, but of all the people of the state participated."

But the minority members held a directly contradictory opinion. There was an overawing power, they said, and the great body of the loyal people "did not participate or clearly concur" in the action taken; and they make citations from the evidence submitted to the whole committee which support their position. The larger portion of the territory and perhaps half the population, they said, was outside the federal lines. Moreover, in New Orleans the faction that was supporting McClellan for the presidency and the Durant faction did not participate in the elections of September, 1864.

A study of the reports and the evidence leads me to the conclusion, not prejudiced, I sincerely hope, that while both reports state their conclusions in somewhat exaggerated terms, the main contention of the majority, that the state government as organized was the choice of the majority of the loyal people, by expression or acquiescence, and that it could maintain itself against "domestic" violence, is clear enough.

The report of the Committee on the Judiciary, in the case of Messrs. Smith and Cutler, senators-elect from Louisiana, was laid before the Senate almost immediately. It is sufficient to quote the concluding paragraphs:

"The persons in possession of the local authorities of Louisiana having rebelled against the authority of the United States, and her inhabitants having been declared to be in a state of insurrection in pursuance of a law passed by the two houses of Congress, your committee deem it improper for this body to admit to seats senators from Louisiana till by some joint action of both houses there shall be some recognition of an

existing state government acting in harmony with the government of the United States and recognizing its authority.

"Your committee, therefore, recommend for adoption, before taking definite action upon the rights of the claimants to seats, the accompanying resolution:

"*Resolved*, etc., That the United States do hereby recognize the government of the state of Louisiana, inaugurated under and by the convention which assembled on the sixth day of April, A. D. 1864, at the city of New Orleans, as the legitimate government of said state, entitled to the guarantee and all the rights of a state government under the Constitution of the United States."

On Friday, February 24th, the resolutions came up for discussion. Practically the whole of the night session, more than half of the morning session and nearly the whole of a protracted night session on Saturday, February 25th, and nearly an hour on Monday morning, February 27th, were devoted to them. Senator Sumner moved to substitute resolutions which, among other things, offered both political and civil rights regardless of color or race. It was further moved to amend the substitute by adding the word "or sex;" and on this ridiculous amendment to an amendment the sense of the Senate would have been first taken had the resolutions ever come to a direct vote. The majority of the senators present Saturday night were ready to come to a final vote. But there was opposition; five times the yeas and nays were called on motions to postpone or adjourn. Nineteen senators were absent and 31 present; of whom 7 Republicans and 5 Democrats, including Mr. Powell (Ky.), the only Democratic member of the Committee on the Judiciary, voted in the affirmative; and 2 Democrats and 17 Republicans voted in the negative, including all the Republican members of the committee save one, who if present would undoubtedly have voted nay also.

Senator Trumbull charged the Republican members of the minority with factious obstruction. Senator Sumner, to whom the remarks were particularly addressed, repudiated the charge of factiousness, but insisted that the Senate could not be brought to a vote that night. "Parliamentary law is against" it; "and the importance of the measure justifies a resort to every instrument that parliamentary law supplies." When the Senate finally adjourned (without division) the measure was left as unfinished business. The impression made by the votes and the debate is that the resolutions of the committee would have passed that night if they had been brought to a vote.

On Monday morning, February 27th, at noon, with just five days more before the close of Congress and with five important bills, the internal revenue bill, the Indian appropriation bill, the civil appro-

priation bill, a tariff bill and the army and navy appropriation bill still unfinished, Senator Sherman, chairman of the Finance Committee, moved to pass over the unfinished business and take up the special order for the day, the internal revenue bill. Mr. Trumbull fought for nearly an hour against postponement, on the ground that the resolution could be disposed of in a few hours more, but Senator Sherman's motion prevailed, 34 to 12. Nine of those who voted nay on Saturday voted yea on Monday. The resolutions were never again reached. Their importance was fully recognized. But it was undoubtedly true, as alleged in debate, that some wanted universal suffrage or nothing, others were convinced that it was a very serious question what to do with the free negro, a question on which they hardly knew their own minds, neither was there an expression by the country as yet; it could hardly be expected that the resolutions would pass the house in the press at the close of this final session of the Thirty-eighth Congress; the matter would surely come up early in the next Congress in some form; and the financial measures were very urgent. On March 3d the committee asked to be discharged from the consideration of a resolution recognizing the government of Arkansas.

It is proper to stop here. We have followed the earlier period of reconstruction practically to its close. During the summer of 1865 President Lincoln's policy was extended by his successor. A number of congressmen and senators were ready to apply for admission in December. But it was more than ever apparent that presidential reconstruction in the seceding states would result presently in putting the state governments into the hands of men who had taken part in the war, into the hands not of consistent loyalists but of men who, though they could take the amnesty oath without perjury, had not laid down arms until military necessity drove them to it; who four years before had heartily undertaken the defense of the new Confederate government. Doubts as to trusting the management of the free negroes to them might easily arise; and action that would commit the state governments to their control beyond the power of Congress to recall might well be adopted with caution by the party which had fought to save the Union and free the slaves. The Joint Committee on Reconstruction was appointed by the Thirty-ninth Congress immediately after it assembled and everything relating to the reorganization of the seceding states and the admission of representatives and senators was made to wait upon their report. They reported in the spring of 1866, and legislation was soon passed taking the initiative out of the hands of the President and of the people of the states and regulating the matter by national

law. This break in the continuity of development makes the close of the Thirty-eighth Congress the end of a period.

FREDERICK W. MOORE.

NOTE.

Applications for admission to the National Senate and House of Representatives from the Seceding States during the Thirty-eighth Congress, 1863–1865.

The border States—Delaware, Maryland, Kentucky and Missouri—are omitted from the list and are not considered in the main article, since the contests from them involved, in the main, a very different set of considerations.

Senate, Thirty-eighth Congress, First Session, December 7, 1863.

L. J. Bowden, of Virginia, succeeded W. T. Willey, resigned, at the special session of the Senate, March 4, 1863. *Cong. Globe*, 37 Cong., 3 sess., p. 1553.

Waitman T. Willey and P. G. Vanwinkle, of West Virginia. Their credentials were received and they were admitted December 7, 1863. *Cong. Globe*, 38 Cong., 1 sess., p. 1.

W. M. Fishback and E. Baxter, of Arkansas, on June 13, 1864, were refused seats. *Cong. Globe*, 38 Cong., 1 sess., pp. 2392, 2458, 2586, 2842, 2895–2906, 3285, 3360–3368; *Cont. Elec.*, 641; *Senate Reports*, 38 Cong., 1 sess., No. 94.

Second Session, December 5, 1864.

Joseph Segar, of Virginia. His credentials as senator to succeed L. J. Bowden, deceased, were received and laid on the table, February 17, 1865. *Cong. Globe*, 38 Cong., 2 sess., pp. 845, 849.

R. King Cutler and Charles Smith, of Louisiana. Their credentials were promptly referred to the committee, which reported on February 18, 1865, a joint resolntion recognizing the free state government of Louisiana. On February 27 the resolution was postponed and never again reached. *Cong. Globe*, 38 Cong., 2 sess., pp. 5, 8, 903, 1011, 1091, 1101, 1128; *Cont. Elec.*, 643; *Senate Reports*, 38 Cong., 2 sess., No. 127.

Michael Hahn, of Louisiana. His credentials were received March 2, 1865, and laid on the table. *Cong. Globe*, 38 Cong., 2 sess., p. 1278.

Senate, Special Session, March 4, 1865.

William D. Snow, of Arkansas. His credentials were referred March 8th to the Committee on the Judiciary, which next day reported recommending "that the question of the admission of Mr. Snow to a seat be postponed till the next session of Congress, and until Congress shall take action in regard to the recognition of the alleged existing state government in Arkansas." The recommendation was agreed to. Thereupon

the credentials of John C. Underwood, of Virginia, were presented, the credentials of Messrs. Segar and Hahn were again presented, and all were postponed until the next session. *Cong. Globe*, 38 Cong., 2 sess., pp. 1427-1434. *Senate Reports*, 38 Cong., 2 sess. (Special Session).

House of Representatives, Thirty-eighth Congress, First Session, December 7, 1863.

A. P. Field, from the first district of Louisiana, Thomas Cottman, from the second, and Joshua Baker, from the state at large. All three names were entered on the roll by the clerk. Field and Baker took part in the election of speaker, but on a yea and nay vote their cases were sent to the Committee of Elections and they were not allowed to be sworn in. Mr. Baker seems never to have pressed his claims. Mr. Cottman soon resigned. The committee recommended that Mr. Field be not seated, and the House so ordered, February 9, 1864. *Cong. Globe*, 38 Cong., 1 sess., pp. 4, 5, 6, 7, 8, 33, 332, 411ff., 543ff.; *Cont. Elec.*, p. 580; *House Reports*, 38 Cong., 1 sess., No. 8.

Joseph Segar, from the first district of Virginia, was refused a seat, May 17, 1864. *Cong. Globe*, 38 Cong., 1 sess., pp. 6, 12, 332, 2311–2323, 2424; *Cont. Elec.*, p. 577; *House Reports*, 38 Cong., 1 sess., No. 9.

Lewis McKenzie *vs.* B. M. Kitchen, from the seventh district of Virginia. Both were refused seats. G. C. Smith (Ky., Rep.) made a minority report recommending that Mr. Kitchin be seated. The cases were disposed of February 26 and April 16, 1864, respectively. *Cong. Globe*, 38 Cong., 1 sess., pp. 6, 18, 37, 847ff., 1673ff., 2424; *Cont. Elec.*, p. 468; *House Reports*, 38 Cong., 1 sess., No. 14.

L. H. Chandler, from the second district of Virginia, was refused a seat, May 17, 1864. *Cong. Globe*, 38 Cong., 1 sess., pp. 6, 12, 1854, 2311–2323, 2424; *Cont. Elec.*, p. 520; *House Reports*, 38 Cong., 1 sess., No. 59.

M. F. Bonzano from the first district, W. D. Mann from the second, T. M. Wells from the third, R. W. Taliaferro and A. P. Field, all from Louisiana. The claims of Messrs. Wells and Taliaferro were never reported on. It does not appear that they were ever present. The committee reported favorably in the case of Mr. Bonzano, February 11, 1864, and in the case of Messrs. Field and Mann, February 17th. But the House did not take up the reports. *Cong. Globe*, 38 Cong., 1 sess., pp. 2, 3, 756, 870, 1395; *Cont. Elec.*, pp. 583ff; *House Reports*, 38 Cong, 1 sess., No. 8.

T. M. Jacks from the first, A. C. Rodgers from the second and J. M. Johnson from the third district of Arkansas. Their credentials were presented in the first session of the Thirty-eighth Congress. At the next session Messrs. Jacks and Johnson were recommended for admission. No action was taken. *Cong. Globe*, 38 Cong., 1 sess., pp. 574, 680, 884, 2253, 2289, 3178, 3389, 3423, 3517, 3527; 38 Cong., 2 sess., pp. 870, 1395; *Cont. Elec.*, p. 597; *House Reports*, 38 Cong., 1 sess. (probably not printed); 38 Cong., 2 sess., No. 18.